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ABSTRACT

Litigation of handicapped students' and employees' rights showed a significant increase in 1987. The increase can be attributed primarily to the filing of a substantial number of cases to obtain attorneys' fees following the enactment of the Handicapped Children's Protective Act in 1986. Two major issues were raised in these cases: the availability of attorneys' fees for administrative hearings and the constitutionality of the retroactive application of the law. In a widely publicized case, the United States Supreme Court ruled that a teacher suffering from the contagious disease of tuberculosis was a "handicapped individual" within the meaning of section 504 of the Rehabilitation Act. While the Court did not address whether a person who is simply a carrier of a contagious disease is handicapped, the case will undoubtedly be paramount in interpreting the rights of victims of the acquired immune deficiency syndrome (AIDS). Cases are summarized under the following topics: (1) entitlement to services; (2) procedural safeguards; (3) placement; (4) related services; (5) discipline; (6) remedies; (7) statute of limitations; (8) state law; and (9) discrimination under the Rehabilitation Act, section 504. (MLF)

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Nelda H. Cambron-McCabe

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INTRODUCTION

Litigation of handicapped students' and employees' rights showed a significant increase in 1987. The increase can be attributed primarily to the filing of a substantial number of cases to obtain attorneys' fees following the enactment of the Handicapped Children's Protection Act in 1986. Two major issues were raised in these cases: the availability of

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attorneys' fees for administrative hearings and the constitutionality of the retroactive application of the law.

The most widely-publicized case was the United States Supreme Court's decision in *School Board of Nassau County, Florida v. Arline*.[1] A teacher suffering from the contagious disease of tuberculosis was found to be a "handicapped individual" within the meaning of section 504 of the Rehabilitation Act. While the Court did not address whether a person who is simply a carrier of a contagious disease is handicapped, the case will undoubtedly be paramount in interpreting the rights of AIDS victims.

ENTITLEMENT TO SERVICES

Under the EHA regulations, local educational agencies must provide special education and related services for private school handicapped children residing within their jurisdiction.[2] Questions have been raised about the delivery of special education services to parochial school sites in the wake of the Supreme Court's ruling that title I (now chapter I) services cannot be provided "on-site" for parochial school students.[3] Although the issue has generated substantial debate and concern, few legal cases have been decided. In 1987 two decisions were rendered in a New York case.

A New York school district terminated on-site special education programs to children of the Satmar Hasidic sect. Relying on a state education law, the school district sought a declaratory judgment that it was required to deliver special education services to nonpublic students only in the public schools and only in a nonsegregated setting (public and nonpublic students). A New York supreme court rejected this position, finding that it is permissible, and in some instances necessary, to provide services at other sites as long as the educational programs are not physically or educationally identified with the parochial school.[4] The court ordered the school district to furnish services through the use of mobile units or at other appropriate neutral sites.

A New York appellate court disagreed. Basing the method for delivery of services on the students' religious background rather than on the nature of their handicaps was held to violate the establishment clause of the federal and state constitutions.[5] Furthermore, the lower court

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1. 107 S. Ct. 1123 (1987).
2. 34 C.F.R. § 300.452.
3. *See* Aguilar v. Felton, 473 U.S. 402 (1985).
4. Board of Educ. Monroe-Woodbury Cent. School Dist. v. Wieder, 512 N.Y.S.2d 305 (Sup. Ct. 1987).
5. Board of Educ. Monroe-Woodbury Cent. School Dist. v. Wieder, 522 N.Y.S.2d 878 (App. Div. 1987).

order was found to usurp the school board's authority to evaluate and place students on the basis of their individual needs.

State law must be consulted to determine preschoolers' entitlement to special education and related services. The EHA mandates that services must be available for all children between the ages of three and twenty-one, but does not require a school district to provide programs for handicapped children under the state's minimum school age unless programs are being provided for nonhandicapped children in this age group.[6] While a New York appellate court noted that children under the age of five are not covered by the state education law, state law does authorize family court to order appropriate special educational services.[7]

The diagnosis of Acquired Immune Deficiency Syndrome (AIDS) does not automatically render a child "handicapped" within the meaning of the EHA. On a motion to dismiss a section 504 discrimination case brought by a child diagnosed as having AIDS, an Illinois school board argued that the court did not have jurisdiction because the child failed to exhaust the required EHA administrative procedures.[8] The court concluded that the EHA applies to AIDS victims only if their physical condition adversely affects their educational performance thereby requiring the provision of special education and related services.

PROCEDURAL SAFEGUARDS

Extensive procedural safeguards are identified in the EHA to ensure appropriate identification, evaluation, and placement of handicapped children. Prior to the evaluation of a child, parents must be informed of their procedural rights, including a description of the process and procedures, and of the right to an impartial due process hearing to present complaints. After approval of the individualized education program (IEP), changes in the program must be preceded by procedural safeguards. The judiciary has frequently interpreted specific procedural rights and assessed school officials' compliance with the Act.

Rights of Parents or Guardians

The EHA mandates extensive parental involvement in the development of a handicapped child's education program. Courts have inter-

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6. *See* The Yearbook of School Law 1987 at 119 for a discussion of the Education of the Handicapped Amendments Act of 1986, which provided strong incentives for states to serve preschool children.

7. *In re* David "JJ", 517 N.Y.S.2d 606 (App. Div. 1987).

8. Doe v. Belleville Pub. School Dist. No. 118, 672 F. Supp. 342 (S.D. Ill. 1987).

preted the specific rights of parents in several cases. In a Massachusetts case, a noncustodial parent rejected two IEPs proposed by a school district and sought reimbursement for expenses he incurred in obtaining services for his mentally ill son.[9] On administrative appeal, the state rejected the claim on the ground that a divorced, noncustodial parent does not have standing to challenge the educational program proposed or to participate in the development of the IEP. Although neither federal nor state law addresses the rights of noncustodial parents, the Massachusetts federal district court concluded that the parent could not be excluded from the planning and implementation of his son's educational program. The court emphasized that unless a restraining order from a state court limits participation then the right to be involved is "basic." Moreover, the court found it imprudent to design a program without consulting the parent who had financial responsibility for the child's educational expenses.

Two cases involved the status of parents when a conservator or guardian is appointed. To facilitate a placement at a psychiatric hospital, a Texas father consented to a managing conservatorship for his child.[10] Subsequently, he brought suit under EHA to compel his school district to assume responsibility for a residential placement after the child reached eighteen years of age. The Fifth Circuit Court of Appeals held that the father did not have standing to sue; only the managing conservator could initiate suit. However, the court stated that the father could request appointment as "next friend" if the child's interests were not being protected by the conservator or the appointed attorney.

An educable mentally retarded Florida child was declared dependent under state law after the mother's repeated refusal to consent to special education placement.[11] Under the dependency status, a state trial court denied the mother's right to seek an administrative due process hearing after the child was placed without her consent. The appellate court held that dependent status could not be based solely on the educational needs of the child; there must be actual proof of abuse, abandonment, or neglect. Furthermore, the court concluded that the mother was entitled to pursue the administrative procedures regardless of the determination of dependent status on remand.

Change in Placement

Any substantive change in a handicapped student's placement triggers the procedural safeguards of the EHA. Cases in 1987 focused primarily on determining students' current educational placement.

9. Doe v. Anrig, 651 F. Supp. 424 (D. Mass. 1987).
10. Susan R.M. v. Northeast Indep. School Dist., 818 F.2d 455 (5th Cir. 1987).
11. *In re* J.D., 510 So. 2d 623 (Fla. Dist. Ct. App. 1987).

Program Modifications. In a Washington case, parents argued that a change in tutors was a change in placement in violation of the EHA.[12] They alleged that the proposed new tutor was not qualified to provide the assistance their son required. The Ninth Circuit found it unnecessary to rule on the change in placement issue because the tutoring was not provided under an individualized education program (IEP). The child was eligible for special education and had received special instruction for a period of time but was placed in a regular classroom at the parents' request. The tutoring he later received was not "special education" under an IEP.

Placement During Due Process Proceedings. The "stay put" or "status quo" rule of the EHA provides that "[d]uring the pendency of any proceedings conducted . . . unless the state or local educational agency and the parents or guardian otherwise agree, the child shall remain in the current educational placement . . . ."[13] Maintaining the status quo promotes stability and continuity in a handicapped child's educational program.

In two federal district court cases, the District of Columbia court granted preliminary injunctions requiring school districts to maintain current placements in a private facility during the pendency of the review proceedings.[14] The private placements were interim placements ordered by hearing officers because of the District of Columbia school system's failure to propose timely placements. The court noted in one case that unless a hearing officer limits a placement or rules that it is not the current educational placement, the placement is the child's current educational placement.[15] In the second case, the court found that although the hearing officer placed a time limit on the private placement, the school district's delay in proposing a public school placement justified the continuation of the private placement as the current placement during the due process proceedings.[16]

Virginia parents sought readmission to school for their handicapped son during a twenty-nine day suspension.[17] At the time of the suspension, he was not classified as handicapped but later through private testing he was diagnosed as learning disabled. The school district maintained that the child should not be readmitted to school but should remain in his current educational placement—under disciplinary suspension. The federal district court rejected this argument, finding that the denial of

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12. Gregory K. v. Longview School Dist., 811 F.2d 1307 (9th Cir. 1987).
13. 20 U.S.C. § 1415(e)(3).
14. Cochran v. District of Columbia, 660 F. Supp. 314 (D.D.C. 1987); Saleh v. District of Columbia, 660 F. Supp. 212 (D.D.C. 1987).
15. Saleh v. District of Columbia, 660 F. Supp. 212, 214 (D.D.C. 1987).
16. Cochran v. District of Columbia, 660 F. Supp. 314 (D.D.C. 1987).
17. Doe v. Rockingham County School Bd., 658 F. Supp. 403 (W.D. Va. 1987).

educational services once the EHA was triggered violated the language and intent of the "stay put" provision.

Administrative Remedies

The EHA mandates that parents or guardians must exhaust administrative procedures prior to seeking judicial review of educational placement or services decisions.[18] The Fourth Circuit Court of Appeals held that parents are not required to appeal a favorable decision of a local hearing officer in order to exhaust administrative remedies.[19] A decision at the local level is the final administrative decision in the state review process unless appealed by an aggrieved party. The court further held that only a party aggrieved by an administrative decision is entitled to bring a cause of action under the EHA; the law contains no provision for enforcement of final administrative decisions.[20]

While the exhaustion of administrative remedies is generally required, courts have recognized exceptions when evidence indicates that administrative remedies would be unproductive. The Second Circuit Court of Appeals cited three possible exceptions specified by Congress: "(1) it would be futile to use the due process procedures . . . ; (2) an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law; (3) it is improbable that adequate relief can be obtained by pursuing administrative remedies (e.g., the hearing officer lacks the authority to grant the relief sought). . . ."[21] In two separate cases, the appellate court denied a motion for judgment on the pleadings in a Connecticut case when parents alleged all three points[22] and awarded attorneys' fees in a New York case when parents did not exhaust remedies because adequate administrative remedies were not available and resort to the procedures could not or would not have corrected claims.[23] A Virginia federal district court held that a suspended handicapped student who was not offered administrative remedies and was left under suspension for twenty-nine days awaiting disciplinary proceedings was not required to exhaust procedures.[24] New York parents were not required to exhaust administrative remedies when the commis-

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18. In two cases, courts simply declined to entertain claims until administrative procedures were exhausted. Devries v. Fairfax County School Bd., 674 F. Supp. 1219 (E.D. Va. 1987); Edward B. v. Brunelle, 662 F. Supp. 1025 (D.N.H. 1986).

19. Robinson v. Pinderhughes, 810 F.2d 1270 (4th Cir. 1987).

20. The court, however, held that plaintiffs had the right to bring a section 1983 suit for enforcement of the administrative decision.

21. Mrs. W. v. Tirozzi, 832 F.2d 748, 756 (2d Cir. 1987).

22. *Id.*

23. J.G. v. Rochester City School Dist. Bd. of Educ., 830 F.2d 444 (2d Cir. 1987).

24. Doe v. Rockingham County School Bd., 658 F. Supp. 403 (W.D. Va. 1987).

sioner of education had already considered the facts in the case and had declined to fund the parents' request.[25]

Courts rejected several claims that exhaustion of administrative remedies would be futile.[26] The Eleventh Circuit denied plaintiffs' futility argument when there was no attempt to employ the administrative procedures.[27] In this case, a suit was filed on behalf of 6,000 handicapped students alleging that the state of Alabama had violated the EHA by not providing the children a free appropriate education. The plaintiffs argued that the state was unable to conduct thousands of individual hearings, but the appellate court asserted that the filing of a few representative complaints would establish whether the process would be effective.

Two courts held that the exhaustion of administrative remedies was not required because of the nature of the complaints. The Kansas federal district court ruled that in-school suspensions up to five days did not constitute a change in educational placement and was not the type of action encompassed in the EHA protections.[28] An Illinois federal district court held that the EHA and its exhaustion requirement do not apply to an individual diagnosed as having AIDS unless special educational services are needed.[29]

Under the administrative review procedures of the EHA, a parent has the right to a written or electronic verbatim record of the hearing. Indigent New Hampshire parents challenged the state's refusal to provide a free written transcript to use in their suit against the state. The First Circuit interpreted the statute as granting the state the right to provide either alternative.[30] Accordingly, the court held that the state of New Hampshire had complied with the statute by providing an electronic recording.

A New York federal district court ruled that the state commissioner of education can review only the specific issues raised on appeal.[31] In this instance, the commissioner reversed a local commission's decision that a student was learning disabled. Since neither party raised the issue

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25. Vander Malle v. Ambach, 667 F. Supp. 1015 (S.D.N.Y. 1987).

26. Association for Retarded Citizens of Alabama Inc. v. Teague, 830 F.2d 158 (11th Cir. 1987); Davenport v. Rockbridge County School Bd., 658 F. Supp. 132 (W.D. Va. 1987); G.C. v. Coler, 673 F. Supp. 1093 (S.D. Fla. 1987); Hayes v. Unified School Dist. 377, 669 F. Supp. 1519 (D. Kan. 1987); White v. State, 240 Cal. Rptr. 732 (Ct. App. 1987).

27. Association for Retarded Citizens of Alabama Inc. v. Teague, 830 F.2d 158 (11th Cir. 1987).

28. Hayes v. Unified School Dist. 377, 669 F. Supp. 1519 (D. Kan. 1987).

29. Doe v. Belleville Pub. School Dist. No. 118, 672 F. Supp. 342 (S.D. Ill. 1987). *See* text with note 8, *supra*.

30. Edward B. v. Paul, 814 F.2d 52 (1st Cir. 1987).

31. Hiller v. Board of Educ. of Brunswick Cent. School Dist., 674 F. Supp. 73 (N.D.N.Y. 1987).

on appeal, the court ruled that the commissioner had clearly exceeded his scope of authority. Review of the handicap issue on the appeal of an IEP would weaken the procedural safeguards of the EHA and discourage parents from seeking consideration of any issue.

The EHA requires state educational agencies to conduct an impartial review of the local educational agency's hearing and "make an independent decision upon completion of such review."[32] Under Oregon regulations governing review, a different standard of review exists; a state hearing officer can reverse a local referee's decision only if it is not supported by substantial evidence. An Oregon appellate court remanded a case that had received limited review and instructed the state superintendent to conduct an independent review, providing appropriate findings and analysis to support the conclusions.[33]

PLACEMENT

After agreement is reached on a child's IEP, an appropriate placement must be made at public expense. Alternative placements may include a regular classroom with support services, a regular classroom supplemented with resource room instruction, self-contained special classes, home instruction, and hospital or institutional instruction. Within this continuum of placements, a child must be educated in the least restrictive environment (LRE), which may be in a public or private school system depending on the needs of the child and the availability of an appropriate program.

Least Restrictive Environment

The EHA provides that "to the maximum extent appropriate, handicapped children . . . are to be educated with children who are not handicapped, and that . . . removal of handicapped children from the regular educational environment [should occur] only when the nature or severity of the handicap is such that education in regular classes with use of supplementary aids and services cannot be achieved satisfactorily."[34] In an Eighth Circuit case, parents asserted that the mainstreaming provision of the EHA required the school district to place their severely mentally retarded child in a regular elementary school rather than a state school for handicapped children.[35] The federal district court had held that the minimal benefit the child would receive from the placement and the high cost of providing a special teacher did not justify

32. 20 U.S.C. § 1415(c).
33. Tompkins v. Forest Grove School Dist., 740 P.2d 186 (Or. Ct. App. 1987).
34. 20 U.S.C. § 1412(5).
35. A.W. v. Northwest R-1 School Dist., 813 F.2d 158 (8th Cir. 1987).

the placement. The appellate court concurred, holding that cost of the placement and benefit to the child were appropriate considerations. The court emphasized that the provision is qualified by the language of the law specifying that mainstreaming is to occur "to the maximum extent *appropriate*."[36]

Mainstreaming was one of several reasons advanced by a Virginia federal district court in finding a proposed public school district IEP appropriate.[37] The private school selected by the parent educated only learning disabled students. The public school plan was designed to facilitate the transition of the child from special to regular classes, beginning with physical education and music and moving into science and social studies classes as he made sufficient progress. In a Pennsylvania case, a federal district court denied the parents' request for a private placement for their learning disabled son, reasoning that such a placement is appropriate only if a less restrictive program is not appropriate.[38]

Private Facilities

A frequent question raised again in 1987 was whether parents were entitled to reimbursement for tuition for unilateral private placements of their handicapped children. Public school districts are required to place handicapped children in private facilities only if an appropriate public placement is not available. If parents place their children in private facilities when an appropriate public school program is available, they must pay the costs. However, under the Supreme Court's 1985 decision in *Burlington School Committee v. Department of Education*, parents who unilaterally place their children in a private facility pending resolution of a placement may be awarded tuition reimbursement if it is later determined that the private placement is appropriate and the public school placement is inappropriate.[39]

The Fourth Circuit upheld a federal district court's award of tuition reimbursement to a Virginia parent.[40] The school district diagnosed the child as emotionally disturbed but the private testing arranged by the parent indicated a learning disability. When the district persisted in recommending a behavioral adjustment classroom, the parent placed her son in a private facility. The school district argued that tuition should

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36. *Id.* at 163.
37. Rouse v. Wilson, 675 F. Supp. 1012 (W.D. Va. 1987).
38. Garrick B. v. Curwensville Area School Dist., 669 F. Supp. 705 (M.D. Pa. 1987).
39. 471 U.S. 359 (1985). *See* The Yearbook of School Law 1986 at 128-29.
40. Hudson v. Wilson, 828 F.2d 1059 (4th Cir. 1987). The parent also was held to be entitled to reimbursement for private testing for initial diagnosis of the disability, but not for tests to corroborate the findings.

be denied because the child was withdrawn prior to the initiation of administrative proceedings, prior to finalizing the individualized education program, and before the school district had an opportunity to conduct its own tests to corroborate the private testing. In upholding tuition reimbursement, the court noted that the district had sufficient evidence to support the learning disabled diagnosis and that even though the tests were incomplete it was evident that the child was not receiving an appropriate education in the public school program.

The Eleventh Circuit stated that the amount of tuition reimbursement must be determined by balancing the equities of a particular case.[41] In balancing the equities, a Georgia federal district court held that parents were entitled to some reimbursement but not the full costs of placing their child in a residential facility in Tokyo, Japan.[42] A Texas parent was awarded reimbursement but only for costs incurred after challenging the IEP.[43] The court noted that a school district does not have an opportunity to be responsive to a parent's requests unless a complaint is filed.

Tuition or other private expenditures were denied in several instances. The Ninth Circuit rejected a claim for reimbursement for supplemental tutoring when the IEP was found to be appropriate.[44] Reimbursement was denied by a Washington appellate court when parents unilaterally placed their child in a private school without giving the school district an opportunity to assess the child's educational needs.[45] The court emphasized that parental disagreement with a school system's proposed program is an essential element in the right to reimbursement.

The EHA requires states to ensure that private schools providing services to handicapped students at public expense meet state educational standards. In two cases, parents who unilaterally placed their children in unapproved facilities were denied reimbursement for costs.[46] However, because of unique circumstances, a New York federal district

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41. Jenkins v. Florida, 815 F.2d 629 (11th Cir. 1987) (case remanded for parties to present facts on the equity issue).

42. Drew P. v. Clarke County School Dist., 676 F. Supp. 1559 (M.D. Ga. 1987).

43. Garland Indep. School Dist. v. Wilks, 657 F. Supp. 1163 (N.D. Tex. 1987). The parent received reimbursement for services secured to supplement the school district's program. Although the residential program was the appropriate placement, the parent was not penalized because she could not afford such a program.

44. Gregory K. v. Longview School Dist., 811 F.2d 1307 (9th Cir. 1987). *See also* Rouse v. Wilson, 675 F. Supp. 1012 (W.D. Va. 1987) (reimbursement for private education denied).

45. Hunter v. Seattle School Dist. No. 1, 731 P.2d 19 (Wash. Ct. App. 1987).

46. Schimmel v. Spillane, 819 F.2d 477 (4th Cir. 1987); Doe v. Anrig, 651 F. Supp. 424 (D. Mass. 1987).

court ordered placement of a child in such a facility.[47] The court found reimbursement of costs and continued placement justified since the commissioner of education had not been able to identify an appropriate alternative placement. Further in support of the placement, the court noted that there was no dispute that the child would receive an appropriate education in the private school and that the school had approval status at the time the parents initiated administrative proceedings.

According to the North Carolina State Board of Education's interpretation of state law, a hearing can be conducted on the issue of tuition reimbursement, but a hearing officer is not authorized to make an award. A federal district court held that this position was inconsistent with the EHA, and federal law must supersede state law.[48] However, upon review by the Fourth Circuit, the case was declared moot because the parents and the local board of education had agreed to a partial settlement.[49] The only questions remaining involved injunctive and declaratory relief against state officials to forbid enforcement of the restriction on hearing officers. Since the parents had achieved their primary objective of reimbursement, further relief from the appellate court was not needed. The court noted that future violations of the EHA rights would be unlikely to occur in light of a "Letter Ruling" from the Department of Education supporting the federal district court decision.

Several states raised the eleventh amendment as a bar to the recovery of tuition costs. Under the eleventh amendment, states cannot be sued in federal courts unless they consent through waiver of immunity or Congress expressly abrogates immunity. The Supreme Court's 1985 decision holding that the Rehabilitation Act of 1973 did not abolish states' immunity to suit has raised questions regarding states' immunity to suits under the EHA.[50] Three federal district courts adopted the reasoning advanced earlier by the First Circuit and concluded that Congress acted pursuant to its fourteenth amendment powers in enacting the EHA and that the intent to abrogate eleventh amendment immunity was unmistakably clear.[51]

In addition to tuition reimbursement requests, courts addressed school districts' obligation to pay for noneducational costs associated with private placements. The District of Columbia federal district court

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47. Antkowiak v. Ambach, 653 F. Supp. 1405 (W.D.N.Y. 1987).
48. S-1 v. Spangler, 650 F. Supp. 1427 (M.D.N.C. 1986).
49. S-1 v. Spangler, 832 F.2d 294 (4th Cir. 1987).
50. Atascadero State Hosp. v. Scanlon, 473 U.S. 234 (1985).
51. Antkowiak v. Ambach, 653 F. Supp. 1405 (W.D.N.Y. 1987); Barwacz v. Michigan Dep't of Educ., 674 F. Supp. 1296 (W.D. Mich. 1987); Edward B. v. Brunelle, 662 F. Supp. 1025 (D.N.H. 1986). *See* David D. v. Dartmouth School Comm., 775 F.2d 411 (1st Cir. 1985), *cert. denied*, 106 S. Ct. 1790 (1986); The Yearbook of School Law 1986 at 140-41.

held that the board of education was required to fund a student's placement in a group home as well as a private day school.[52] Although the group home was a separate facility, it was an essential part of the total educational program. A New York federal district court examined a school district's financial responsibility for a residential psychiatric hospital placement.[53] The court noted that case law has established that "[a]s long as the child is properly educable only through a residential placement, when the medical, social or emotional problems that require hospitalization create or are intertwined with the educational problem, the states remain responsible for the costs of the residential placement."[54] In this case, the court found that the educational handicap could not be separated and treated apart from the emotional and behavioral problems. Consequently, the school district was unable to satisfy its obligation under the EHA by simply paying tuition for the education component of the hospital program. A trial was ordered to assess which expenses were maintenance, support services, or medical.

RELATED SERVICES

The EHA specifies that an appropriate education includes special education *and* related services "required to assist a handicapped child to benefit from special education."[55] Cases in 1987 addressed full-time nursing services, transportation, counseling, and psychological services.

In 1986 a New York federal district court held that a school district was not required to provide constant nursing care to enable a handicapped student to attend school.[56] The Second Circuit Court of Appeals affirmed the decision, noting that where nursing care had been required previously by a court it was intermittent, not constant.[57] The Supreme Court denied *certiorari*.[58]

Similarly, nursing care was an issue in a Pennsylvania case.[59] A severely handicapped child required the constant undivided attention of a nurse to perform varied and extensive services, especially the suctioning of mucous from the lungs. The Pennsylvania federal district court distinguished between intermittent and constant care, as did the

52. Kerkam v. District of Columbia Bd. of Educ., 672 F. Supp. 519 (D.D.C. 1987) (parents also were awarded reimbursement for expenditures).

53. Vander Malle v. Ambach, 667 F. Supp. 1015 (S.D.N.Y. 1987).

54. *Id.* at 1039.

55. 20 U.S.C. § 1401(17).

56. *See* The Yearbook of School Law 1987 at 129.

57. Detsel v. Board of Educ. of Auburn Enlarged City School Dist., 820 F.2d 587 (2d Cir. 1987).

58. 108 S. Ct. 495 (1987).

59. Bevin H. v. Wright, 666 F. Supp. 71 (W.D. Pa. 1987).

Second Circuit in the previous case. Constant care was considered to be too intensive and costly and more closely related to medical services. The court, however, cautioned that related services are not limited simply to services that can be provided at a low cost.

Related services must be provided if they are needed for a student to derive some benefit from an educational program. Counseling and psychological services were found to be essential for a New York child "to derive any benefit from special instruction."[60] A Massachusetts hearing officer denied reimbursement of the costs of individual psychotherapy and group therapy because a child's education was not the "central or primary" focus of the sessions.[61] The federal district court overturned the decision, holding that neither the federal nor state law require related services to be primarily for educational purposes; they must simply assist the child to benefit from special education.

In several cases, courts examined school districts' responsibility for transportation costs as a related service for students who are unilaterally placed in private schools. Section 300.451(a) states, in part, that provision must be made for "the participation of private school handicapped children in the program assisted or carried out under this part by providing them with special education and related services." The District of Columbia federal district court interpreted the provision to require school districts to provide private school students with certain services where necessary.[62] As examples, the court noted that speech therapy or a specific learning disability might require special instruction and/or transportation to another site. The provision was not found to encompass related services costs when an appropriate public school program has been rejected by parents.

An Ohio federal district court concluded that "related services" must be interpreted in conjunction with the term "special education."[63] That is, related services are required only for special education programs designed, established, funded, and monitored by the state or local school district. The court also concurred that there is no obligation to pay for private school costs such as transportation when parents decline an appropriate public school placement. A New Jersey appellate court concluded that transportation to a private school was not mandated for an orthopedically handicapped student who did not require special education services.[64] The court cited the Supreme Court's statement that "[i]n the absence of a handicap that requires special education, the need

60. Antkowiak v. Ambach, 653 F. Supp. 1405 (W.D.N.Y. 1987).
61. Doe v. Anrig, 651 F. Supp. 424 (D. Mass. 1987).
62. Work v. McKenzie, 661 F. Supp. 225 (D.D.C. 1987).
63. McNair v. Cardimone, 676 F. Supp. 1361 (S.D. Ohio 1987).
64. A.A. v. Cooperman, 526 A.2d 1103 (N.J. Super. Ct. App. Div. 1987).

for what otherwise might qualify as a related service does not create an obligation under the Act."[65]

DISCIPLINE

Courts reaffirmed that handicapped students are not exempt from reasonable disciplinary measures. An Indiana hyperactive and emotionally disturbed student challenged specific discipline techniques as a violation of his constitutional right to due process and equal protection of the laws.[66] Under the circumstances of the case, the court found that paddling, isolation seating, and taping of the mouth did not violate the student's rights. The paddling was not excessive and was preceded by a discussion with the child's father and warnings to the student. Isolation was characterized as a "relatively innocuous" discipline technique and was warranted because of the child's behavior. The taping of the student's mouth (performed by the student) was viewed as symbolic, rather than punitive, to remind the student to be silent. The Kansas federal district court held that the use of a time-out room for suspension and cool-down periods did not violate handicapped students' liberty and property rights.[67] While the court noted that it might not be the "most effective or sensible disciplinary measure," students were not deprived of an education and were prevented from threatening the safety of other students. Furthermore, students were given adequate notice of behavior that would result in isolation.

The eighth amendment was raised as a bar in two discipline cases.[68] In both instances, the courts rejected the claims based on the Supreme Court's interpretation that the amendment is applicable only in criminal cases.[69]

A Virginia federal district court held that a handicapped student's due process rights were violated by school officials' failure to provide a prompt hearing in a twenty-nine day suspension.[70] The initial suspension occurred prior to a determination that the child was handicapped, but even the minimum basic due process rights mandated for regular students by the Supreme Court in *Goss v. Lopez* were not provided.[71] Also, school officials refused to reinstate the child when they were informed

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65. *Id.* at 1106, *quoting* Irving Indep. School Dist. v. Tatro, 468 U.S. 883, 894 (1984).
66. Cole v. Greenfield-Central Community Schools, 657 F. Supp. 56 (S.D. Ind. 1986).
67. Hayes v. Unified School Dist. No. 377, 669 F. Supp. 1519 (D. Kan. 1987).
68. Garland Indep. School Dist. v. Wilks, 657 F. Supp. 1163 (N.D. Tex. 1987); Hayes v. Unified School Dist. No. 377, 669 F. Supp. 1519 (D. Kan. 1987).
69. Ingraham v. Wright, 430 U.S. 651 (1977).
70. Doe v. Rockingham County School Bd., 658 F. Supp. 403 (W.D. Va. 1987).
71. 419 U.S. 565 (1975).

that he had been diagnosed as handicapped. Summary judgment was granted for the parents based on the school district's failure to inform the parents of their rights under the EHA or to comply with any of its procedural requirements.

The Supreme Court of Mississippi examined the question of whether a school system can expel handicapped children who disrupt the educational program of other children.[72] Citing decisions of the Fourth and Fifth Circuits, the court recognized school officials' "restricted power" to expel handicapped students. Accordingly, the court held that if a child's disruptive behavior is related to the handicapping condition, a change in placement might be warranted but not expulsion. Expulsion could be considered if the behavior is not related, but educational services must be provided during the expulsion period.

REMEDIES

Damages

Courts are in agreement that monetary damages are not available under the EHA unless exceptional circumstances exist showing bad faith and egregious failure to comply with the procedural provisions of the Act.[73] Such exceptional circumstances were not found in a Michigan case.[74] Two other courts simply held that monetary damages were not recoverable.[75] The Connecticut federal district court, however, denied state defendants' motion to dismiss a claim for damages where bad faith was alleged.[76]

Compensatory Services

Courts have found an award of compensatory educational services to be analogous to the granting of retroactive tuition reimbursement. A California appellate court concluded that handicapped children in a state hospital would be entitled to compensatory educational services if they prevailed on their claim that the state had denied them a free appropriate public education.[77]

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72. Board of Trustees of Pascagoula Mun. Separate School Dist. v. Doe, 508 So. 2d 1081 (Miss. 1987).

73. The Supreme Court carefully distinguished between awarding tuition reimbursement and awarding damages; reimbursement is simply the recovery of costs. Burlington School Comm. v. Department of Educ., 471 U.S. 359 (1985).

74. Barwacz v. Michigan Dep't of Educ., 674 F. Supp. 1296 (W.D. Mich. 1987).

75. Johnson v. Clark, 418 N.W.2d 466 (Mich. Ct. App. 1987); White v. State, 240 Cal. Rptr. 732 (Ct. App. 1987).

76. Silano v. Tirozzi, 651 F. Supp. 1021 (D. Conn. 1987).

77. White v. State, 240 Cal. Rptr. 732 (Ct. App. 1987).

Attorneys' Fees

After the Supreme Court's decision in *Smith v. Robinson*[78] declaring that attorneys' fees are not recoverable under the EHA and that the EHA is the exclusive means for enforcing handicapped children's rights to special education programs, Congress enacted the Handicapped Children's Protection Act (HCPA) to grant courts the discretion to award reasonable attorneys' fees to parents who prevail against school systems.[79] Fees are recoverable for any action or proceeding filed after July 3, 1984 or pending at that time. Several limitations were placed on awards: (1) fees must be based on comparable rates in the community for similar legal services, with no bonus or multiplier permitted in calculating the amount;[80] (2) fees may not be awarded for legal services performed after a parent's or guardian's rejection of an education agency's written offer of settlement (made within specified time frames) if the final relief gained through the due process hearing or court action is not more favorable than the settlement offer; and (3) where the education agency has not prolonged the controversy or violated procedural safeguards of the EHA, fees may be reduced if the parent or guardian "unreasonably protracted" the controversy, or the time spent on the action and services was excessive compared to similar proceedings.

One of the most frequently raised questions in 1987 was whether the HCPA authorizes the award of attorneys' fees for work conducted solely at the administrative level. The amendment provides that in "any action or proceeding" a court may award fees.[81] School districts argued that the parents or guardians must file suit based on the merits of a case, not simply to recover attorneys' fees. Most courts found that the plain wording of the statute (any action or *proceeding*) combined with the legislative history clearly established that fees are available for work at the administrative level.[82] The debates in Congress unambiguously show an intent for the recovery of attorneys' fees for administrative proceedings. The federal district court of Kansas noted Senator Simon's remarks: "For minority group parents, for low-income as well as mod-

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78. 469 U.S. 992 (1984).

79. 20 U.S.C. § 1415(e) (1986).

80. A bonus or multiplier is sometimes used in unusually difficult cases or cases that involve a significant public issue.

81. 20 U.S.C. § 1415(e)(4)(D).

82. Burpee v. Manchester School Dist., 661 F. Supp. 731 (D.N.H. 1987); Counsel v. Dow, 666 F. Supp. 366 (D. Conn. 1987); Kristi W. v. Graham Indep. School Dist., 663 F. Supp. 86 (N.D. Tex. 1987); Mathern v. Campbell County Children's Center, 674 F. Supp. 816 (D. Wyo. 1987); Moore v. District of Columbia, 666 F. Supp. 263 (D.D.C. 1987); Prescott v. Palos Verdes Peninsula Unified School Dist., 659 F. Supp. 921 (C.D. Cal. 1987); School Bd. of Prince William County v. Malone, 662 F. Supp. 999 (E.D. Va. 1987); Unified School Dist. No. 259 v. Newton, 673 F. Supp. 418 (D. Kan. 1987).

erate income parents, the right to obtain reimbursement for assistance they may need at the administrative level is critically important to assure fair and equal access to the formal procedures mandated by Congress . . . ."[83]

Because Congress fashioned the fee awards of HCPA after other fee shifting statutes, several school districts argued that the legislative history of the law should be examined in light of the Supreme Court's decision in *North Carolina Department of Transportation v. Crest Street Community Council.*[84] In that case, the Court held that attorneys' fees under 42 U.S.C. section 1988 are to be awarded for administrative proceedings only if they are part of a lawsuit. Earlier, however, the Supreme Court had noted in dicta that it would be anomalous for a court to award fees if a case proceeded to court but not award fees if it were resolved at the administrative level.[85] The latter case was cited in reports by both the Senate and House to support attorneys' fees for administrative level work. While the federal district courts of the District of Columbia, Kansas, and New Hampshire recognized Congress's desire to pattern the amendment after fee provisions in other civil rights statutes, the application of the *Crest Street* ruling was found to be inappropriate because of the clear intent to provide for the award of attorneys' fees for administrative proceedings.[86] The federal district court of Delaware, however, disagreed, finding that the overriding congressional intent was to have the attorneys' fees provision interpreted as all other civil rights fee shifting statutes.[87]

The constitutionality of the retroactive application of the attorneys' fees provision of the HCPA was raised in a number of cases. School districts argued that retroactivity violated the separation of powers, Congress's spending power under article I, section 8 of the Constitution, and the eleventh amendment. Federal district courts in the District of Columbia and Virginia held that separation of powers does not prevent Congress from clarifying its own legislation.[88] The separation of powers would be violated only if the statute prescribed a rule of decision in a pending case. The HCPA does not affect the substantive decisions of these cases.

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83. Unified School Dist. No. 259 v. Newton, 673 F. Supp. 418 (D. Kan. 1987).
84. 107 S. Ct. 336 (1986).
85. New York Gaslight Club, Inc. v. Carey, 447 U.S. 54 (1980).
86. Burpee v. Manchester School Dist., 661 F. Supp. 731 (D.N.H. 1987); Moore v. District of Columbia, 666 F. Supp. 263 (D.D.C. 1987); Unified School Dist. No. 259 v. Newton, 673 F. Supp. 418 (D. Kan. 1987).
87. Rollison v. Biggs, 660 F. Supp. 875 (D. Del. 1987).
88. Capello v. District of Columbia Bd. of Educ., 669 F. Supp. 14 (D.D.C. 1987); Moore v. District of Columbia, 666 F. Supp. 263 (D.D.C. 1987); School Bd. of the County of Prince William v. Malone, 662 F. Supp. 999 (E.D. Va. 1987).

Because legislation enacted pursuant to Congress's spending power is similar to a contract, school districts claimed that they must voluntarily and knowingly accept the terms of the contract. In several cases, school districts urged courts to hold the HCPA unconstitutional because it imposed a condition on a grant of federal money, one which the districts were unaware when they accepted the funds.[89] To support this argument school districts raised the Supreme Court's decision in *Pennhurst State School and Hospital v. Halderman* as a bar to retroactive application.[90] Reliance of the school districts on *Pennhurst*, however, was found to be misplaced. The Supreme Court did not hold that Congress could not retroactively condition the receipt of funds; rather the Court held that "if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously."[91] Several courts noted that the HCPA certainly would meet this test.[92] The federal district courts of Connecticut and Kansas emphasized that the EHA was not enacted solely on the basis of Congress's spending power but also was based on the fourteenth amendment to assure equal protection of the law.[93] They concluded that the legislation was constitutional because it is rationally related to a legitimate legislative purpose.

Two cases addressed whether the HCPA violated the school districts' sovereign immunity under the eleventh amendment.[94] The courts noted that the EHA was enacted under the fourteenth amendment, and that Congress has the power to set aside sovereign immunity to enforce the fourteenth amendment.

Only a parent or a guardian who is the prevailing party is eligible for an award of attorneys' fees. A Texas federal district court held that a parent who prevails on the central issue by acquiring the relief requested is the prevailing party.[95] Although the hearing officer in this case decided

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89. Capello v. District of Columbia Bd. of Educ., 669 F. Supp. 14 (D.D.C. 1987); Moore v. District of Columbia, 666 F. Supp. 263 (D.D.C. 1987); Counsel v. Dow, 666 F. Supp. 366 (D. Conn. 1987); Rollison v. Biggs, 656 F. Supp. 1204 (D. Del. 1987); School Bd. of the County of Prince William v. Malone, 662 F. Supp. 999 (E.D. Va. 1987); Unified School Dist. No. 259 v. Newton, 673 F. Supp. 418 (D. Kan. 1987); Yaris v. Special School Dist. of St. Louis County, 661 F. Supp. 996 (E.D. Mo. 1987).

90. 451 U.S. 1 (1981).

91. *Id.* at 17.

92. Capello v. District of Columbia Bd. of Educ., 669 F. Supp. 14 (D.D.C. 1987); Rollison v. Biggs, 656 F. Supp. 1204 (D. Del. 1987); Unified School Dist. No. 259 v. Newton, 673 F. Supp. 418 (D. Kan. 1987); Yaris v. Special School Dist. of St. Louis County, 661 F. Supp. 996 (E.D. Mo. 1987).

93. Counsel v. Dow, 666 F. Supp. 366 (D. Conn. 1987); Unified School Dist. No. 259 v. Newton, 673 F. Supp. 418 (D. Kan. 1987).

94. *See* Capello v. District of Columbia Bd. of Educ., 669 F. Supp. 14 (D.D.C. 1987); Yaris v. Special School Dist. of St. Louis County, 661 F. Supp. 996 (E.D. Mo. 1987).

95. Kristi W. v. Graham Indep. School Dist., 663 F. Supp. 86 (N.D. Tex. 1987). *See also* Counsel v. Dow, 666 F. Supp. 366 (D. Conn. 1987); Garland Indep. School Dist. v. Wilks, 657 F. Supp. 1163 (N.D. Tex. 1987).

only two of the five points raised in the hearing in favor of the parents, the court found the parents to be the prevailing party because the educational program developed by the school district was determined to be inadequate. Similarly, the federal district courts of Delaware and the District of Columbia held that parents are the prevailing party "if they succeed on any significant issue in litigation which achieves some benefit the parties sought in bringing suit."[96] Nine plaintiffs prevailed in the District of Columbia case when they received all the benefits requested; parents who were denied tuition reimbursement did not prevail in the Delaware case. Parents who reached a settlement through a consent decree were declared the prevailing party in Connecticut[97]

One case addressed the interpretation of "pending" cases for the purpose of attorneys' fees under the HCPA. As noted, the amendment provides that parents are eligible for fees if an action or proceeding was filed prior to July 4, 1984 or was pending on that date. In a District of Columbia case, the school board argued that a case is pending only if the merits of the controversy are unresolved.[98] The law, however, does not distinguish between cases pending on their merits and those pending on fee applications. The federal district court found that congressional intent to restore fully rights diminished by *Smith v. Robinson*[99] would support a broad interpretation of pending. Accordingly, the court concluded that "it would be anomalous for Congress to enact a statute that reverses *Smith* and then not have it affect a case which the [c]ourt of [a]ppeals decided on the authority of *Smith*. Only a comprehensive definition of 'pending' would fully eliminate the repercussions of *Smith*."[100]

The reasonableness of attorneys' fees was an issue in several cases. The courts used the lodestar method, which is the number of hours reasonably expended multiplied by a reasonable hourly rate.[101] Prior to a determination of an appropriate award, however, a plaintiff's attorneys must submit a detailed affidavit outlining the amounts claimed and on what basis. The information requested by the District of Columbia federal district court illustrates the specificity required. The court requested a statement including: "(1) the nature of the claim; (2) whether

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96. Moore v. District of Columbia, 674 F. Supp. 901, 904 (D.D.C. 1987), *quoting* Hensley v. Eckerhart, 461 U.S. 424, 433 (1983); Rollison v. Biggs, 660 F. Supp. 875 (D. Del. 1987). *See* Gregory K. v. Longview School Dist., 811 F.2d 1307 (9th Cir. 1987) (school district placement upheld).

97. Barbara R. v. Tirozzi, 665 F. Supp. 141 (D. Conn. 1987).

98. Capello v. District of Columbia Bd. of Educ., 669 F. Supp. 14 (D.D.C. 1987).

99. 468 U.S. 992 (1984).

100. Capello v. District of Columbia Bd. of Educ., 669 F. Supp. 14, 17 (D.D.C. 1987).

101. *See* Capello v. District of Columbia Bd. of Educ., 669 F. Supp. 14 (D.D.C. 1987); Esther C. v. Ambach, 515 N.Y.S.2d 997 (Sup. Ct. 1987); School Bd. of Prince William County v. Malone, 662 F. Supp. 999 (E.D. Va. 1987).

the plaintiff has prevailed on the merits; (3) how many hours were spent on the claim and how this time was spent; (4) the billing rate for this time; (5) the total amount claimed."[102] In this case, the defendant school district requested the time charge-slips that formed the basis for aggregate charges and also requested the actual bills. The court held that adequate documentation is required but not the bills. The preparation of a bill was recognized as a formality because most clients in EHA cases do not have the financial resources to pay the fees.

The Delaware federal district court denied parents' request for an additional amount because of the delay in payment of the attorneys' fees.[103] In essence, the delay factor would have raised the fees to the current market rate, increasing the award from $77,915 to $97,514. While the court recognized that the delay factor could be granted under the HCPA, it was unwarranted in this case since the delay resulted from the enactment of the amendment several years after the commencement of the lawsuit, not from the actions of the defendants.

In the Delaware case, the defendants challenged $77,915 as being disproportionate to the plaintiff's settlement of $4,829, which represented all the relief requested.[104] Relying on a recent Supreme Court decision interpreting fees under section 1988, the court declined to reduce the fees, noting that settlements cannot be viewed solely in individual financial terms because of the public benefit that is derived from civil rights litigation.[105]

In the District of Columbia case the federal district court expressed dissatisfaction with school officials' "do not settle, do not pay" stance regarding attorneys' fees.[106] Numerous criticisms were made by the school district against plaintiffs' counsel: attacked efficiency and integrity of attorneys; criticized counsel's scheduling practices; requested extensive documentation of all charges; and demanded actual bills. The court characterized the school district's actions as "stonewalling" and "nit-picking" and warned that the delay that occurred in this case should not be repeated. Of plaintiffs' total award of $48,474 for attorneys' fees, $29,357 was granted for the litigation of the merits of the case and $19,117 for the litigation of the attorneys' fees question.

The Second Circuit awarded attorneys' fees under 42 U.S.C. section 1988 in a case brought under the EHA and section 1983.[107] By awarding

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102. Moore v. District of Columbia, 674 F. Supp. 901, 902 (D.D.C. 1987) (Moore II). *See also* Kristi W. v. Graham Indep. School Dist., 663 F. Supp. 86 (N.D. Tex. 1987).
103. Rollison v. Biggs, 656 F. Supp. 1204 (D. Del. 1987).
104. *Id.*
105. *Id.*, *citing* City of Riverside v. Rivera, 106 S. Ct. 2686 (1986).
106. Moore v. District of Columbia, 674 F. Supp. 901 (D.D.C. 1987).
107. J. G. v. Rochester City School Dist. Bd. of Educ., 830 F.2d 444 (2d Cir. 1987). *See* The Yearbook of School Law 1987 at 134.

fees under section 1988, the court avoided addressing whether a direct cause of action can be filed under EHA when administrative procedures have not been exhausted. The court, however, did conclude that the circumstances justified an exception to the exhaustion requirement.

STATUTE OF LIMITATIONS

Since the EHA does not contain a statute of limitations for filing suits, courts determine which state law provisions are analogous to the federal law. The Fourth Circuit Court of Appeals upheld a federal district court's application of a Virginia one-year limitation that is applied to all personal actions for which no limitation is specified.[108] A statute that appeared to be analogous provided only a short thirty-day limitation period which the court felt would conflict with EHA policy. The most serious concern, however, was the fact that many parents would not be represented by an attorney in the administrative proceedings and might not be apprised of the short limitation period. The New Hampshire federal district court also declined to apply a thirty-day limitation, finding that a suit filed within sixty-four days was certainly reasonable.[109] A four-month limitation period was invoked by a New York federal district court.[110]

The Ninth Circuit Court of Appeals rejected the application of the California statute of limitations tolling provision for children under the age of majority.[111] The court stated that such a provision would undercut federal policy designed to assure timely and appropriate educational programs for handicapped students. To permit a child to file suit later would be inconsistent with the substantial rights conferred on parents on behalf of their children.

STATE LAW

The EHA allows the aggrieved party in state administrative proceedings to file suit in state or federal court.[112] In a Virginia case, two school boards that were ordered to pay children's private school tuition appealed the decisions under state law in state circuit courts. The students and parents removed the case to federal court, and the school boards moved to remand the action to state courts.[113] The court was

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108. Schimmel v. Spillane, 819 F.2d 477 (4th Cir. 1987).
109. Edward B. v. Brunelle, 662 F. Supp. 1025 (D.N.H. 1986).
110. Vander Malle v. Ambach, 667 F. Supp. 1015 (S.D.N.Y. 1987).
111. Alexopulos v. San Francisco Unified School Dist., 817 F.2d 551 (9th Cir. 1987).
112. 29 U.S.C. § 1415(e)(2). *See* Board of Trustees of Pascagoula Mun. Separate School Dist. v. Doe, 508 So. 2d 1081 (Miss. 1987).
113. Amelia County School Bd. v. Virginia Bd. of Educ., 661 F. Supp. 889 (E.D. Va. 1987).

guided in its assessment of removal by the application of the federal question jurisdiction—that is, whether the case arises under the Constitution, laws, or treaties of the United States. To determine whether the case involved federal law, the court applied the "well-pleaded complaint" rule. Under this rule, a court must look to what appears in the plaintiffs' statement of the issues. However, defendants may invoke an exception to the rule, the "artful pleading" doctrine, to recharacterize the state claim as a federal claim if federal law provides a cause of action to remedy the alleged wrong and the state law claim is preempted by federal law. Because federal law clearly provides a cause of action, the court focused on whether the EHA preempts the Virginia law claims. Relying on the principle of "cooperative federalism" articulated by the First Circuit, the court concluded that the Act did not preempt state law. The federal law provides financial assistance but "does not presume to impose a uniform approach to the education of children within a given disability; it requires only that a 'free appropriate education,' in conformity with the state's educational standards, be provided to each disabled child . . . ."[114] The court concluded that the EHA does not preempt state law as long as state standards meet the minimum federal guidelines. Virginia law was found clearly to meet the federal requirements, leaving the school boards as "masters of their claims."

Plaintiffs in a Michigan case maintained that state law provided a higher level of educational opportunity than the EHA.[115] The Michigan special education law specifies that educational agencies "shall provide special education programs and services designed to develop the maximum potential of each handicapped person."[116] On denying defendants' motion for summary judgment, the federal district court concluded that state court decisions and other statutory provisions indicate that the state law does not require the best possible program but, at the same time, requires "something more than the basic federal minimum."[117]

State law was the controlling issue in a New York case. The Second Circuit ruled that abstention was appropriate in the case until state courts interpreted the term "actual and only residence" in the state education law.[118] A Pennsylvania commonwealth court affirmed a common pleas court order granting a school district's motion for a judgment on the pleadings.[119] The public school code did not establish an entitle-

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114. *Id.* at 893, *quoting* Town of Burlington v. Department of Educ. of Massachusetts, 736 F.2d 773, 784 (1st Cir. 1984, *aff'd sub nom.* Burlington School Comm. v. Department of Educ., 471 U.S. 359 (1985).

115. Barwacz v. Michigan Dep't of Educ., 674 F. Supp. 1296 (W.D. Mich. 1987).

116. *Id.* at 1304.

117. *Id.*

118. Catlin v. Ambach, 820 F.2d 588 (2d Cir. 1987).

119. Agostine v. School Dist. of Philadelphia, 527 A.2d 193 (Pa. Commw. Ct. 1987).

ment to monetary relief for injuries resulting from misdiagnosis and incorrect educational placement of handicapped children.

DISCRIMINATION UNDER THE REHABILITATION ACT, SECTION 504

The Rehabilitation Act of 1973, section 504, provides that "[n]o otherwise qualified handicapped individual . . . shall, solely by reasons of his handicap, be excluded from participation in, or be denied the benefits of, or be subjected to discrimination under any program or activity receiving [f]ederal financial assistance."[120] Section 504 is broader than the EHA and applies to educational and noneducational agencies receiving federal assistance. It prohibits recipients of federal funds from discriminating against handicapped individuals in educational programs and employment.

Students

As noted, the Supreme Court in *Smith v. Robinson* interpreted the EHA as the exclusive means for enforcing handicapped students' rights to a free appropriate education.[121] In response to this decision, Congress enacted the Handicapped Children's Protection Act (HCPA) of 1986, stipulating *inter alia* that the EHA does not restrict rights or remedies available under the federal Constitution, section 504 of the Rehabilitation Act, or other civil rights statutes.[122] While Congress specifically stated that the attorneys' fees provision of the HCPA is retroactive, the omission of such a provision for the nonexclusivity section has led to disagreements among courts regarding the retroactive effect of the law.

Courts have generally invoked the principle advanced by the Supreme Court that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary."[123] A Connecticut federal district court rejected retroactive application, finding that all three exceptions existed.[124] The court pointed to the explicit retroactive designation for the attorneys' fees section and the absence of a parallel provision for the nonexclusivity provision. The legislative history indicated that the initial House bill contained retroactive applica-

120. 29 U.S.C. § 794.
121. 469 U.S. 992 (1984).
122. 20 U.S.C. § 1415.
123. Bradley v. Richmond School Bd., 416 U.S. 696, 711 (1974).
124. Silano v. Tirozzi, 651 F. Supp. 1021 (D. Conn. 1987). *See* DeFalco v. Deer Lake School Dist., 663 F. Supp. 1108 (W.D. Pa. 1987) (held EHA is exclusive remedy; no recognition of enactment of HCPA).

tion for both sections, but the Senate bill, which contained retroactive application only for attorneys' fees, was adopted. Furthermore, the court reasoned that manifest injustice would result since the educational agencies were not liable at the time the actions occurred or the litigation was initiated.

A New Hampshire federal district court denied retroactive application of the nonexclusivity provision based on the lack of specific congressional intent and the legislative history,[125] but on a motion to reconsider, held that it did apply to cases pending at the time of enactment because no exceptions were found to the Supreme Court's general principle of application in pending cases.[126] Similarly, the Second Circuit also found the nonexclusivity provision to be applicable to pending cases.[127] The court stated that the HCPA "simply codifies a congressional purpose long in place which Congress believed the Supreme Court had misinterpreted."[128]

Discrimination is prohibited under section 504 only if a program or activity receives federal financial assistance. Most courts have relied on the Supreme Court's interpretation of title IX that institution-wide financial assistance is inadequate to initiate a case; an individual must claim involvement or exclusion in a program that receives assistance. A student who claimed she was expelled from a nursing program of a private college because of her obesity was unable to show that the nursing program received any federal financial assistance.[129] Similarly, a student seeking admission to a graduate program in English in a private university produced "absolutely no evidence" that the department was the recipient of federal funds.[130]

Courts continued to hold that children infected with AIDS or testing seropositive for AIDS are protected by the Rehabilitation Act. Preliminary injunctions allowing these children to attend school were issued in two cases. A Florida federal district court concluded that exclusion of three hemophiliac brothers from a normal, integrated classroom constituted irreparable injury to the children's well-being and educational potential. Also, expert medical evidence supported returning the children to the regular classroom, and the children were likely to prevail on the merits of the case at trial.[131] Admission to the regular classrooms was

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125. Edward B. v. Brunelle, 660 F. Supp. 51 (D.N.H. 1986).
126. Edward B. v. Brunelle, 662 F. Supp. 1025 (D.N.H. 1986).
127. Mrs. W. v. Tirozzi, 832 F.2d 748 (2d Cir. 1987). *See also* Dodds v. Simpson, 676 F. Supp. 1045 (D. Or. 1987); G.C. v. Coler, 673 F. Supp. 1093 (S.D. Fla. 1987).
128. *Id.* at 755.
129. Russell v. Salve Regina College, 649 F. Supp. 391 (D.R.I. 1986).
130. Stephanidis v. Yale Univ., 652 F. Supp. 110, 113 (D. Conn. 1986), *aff'd*, 814 F.2d 654 (2d Cir. 1987).
131. Ray v. School Dist. of Desoto County, 666 F. Supp. 1524 (M.D. Fla. 1987).

predicated on adherence to a list of guidelines issued by the court. These included: (1) attendance was to be governed by the published guidelines of the Centers for Disease Control and the American Academy of Pediatrics; (2) the children were charged with taking on adult responsibility for being informed of the applicable guidelines and following them stringently; (3) the children were to avoid contact sports or other situations that might result in injury; (4) the school system was to educate the school parent population of the community regarding AIDS; and (5) the children were required to be retested every six months.

A preliminary injunction (and later a permanent injunction) also was issued allowing a California child with the AIDS virus to return to a regular kindergarten classroom.[132] The state high court held that the state board of education possessed the authority to issue guidelines compelling local educational agencies to admit school children with AIDS unless exceptional conditions were present. The child was initially excluded following a biting incident. While the Centers for Disease Control, the American Academy of Pediatrics, and the California State Department of Education have published guidelines advising a more restricted environment for young children who bite, the federal district court concluded that the "overwhelming weight" of medical evidence does not support that AIDS is transmitted by human bites. Accordingly, the court held that the child posed no risk of harm to others in the classroom.

In a motion for summary judgment, a Missouri federal district court addressed whether a person with a contagious disease which does not involve a physical impairment is a "handicapped individual" under section 504.[133] Because an active carrier of hepatitis B is regarded as having an impairment, the federal district court reasoned that such a person is a "handicapped individual." Summary judgment was denied because of material facts in dispute as to whether the handicapped person was denied admission to a learning center solely because of his handicap. Subsequently, the court ruled that he was an otherwise qualified applicant for the learning center and was denied admission solely by reason of his status as a hepatitis B carrier.[134] The learning center personnel contended that the plaintiff's aggressive behavior posed a

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132. Thomas v. Atascadero Unified School Dist., 662 F. Supp. 376 (C.D. Cal. 1987). *See* Board of Educ. of City of Plainfield v. Cooperman, 523 A.2d 655 (N.J. 1987).

133. Kohl v. Woodhaven Learning Center, 672 F. Supp. 1221 (W.D. Mo. 1987). *See* School Bd. of Nassau County, Florida v. Arline, 107 S. Ct. 1123 (1987) (individual who was physically impaired by a contagious disease is a handicapped person within the meaning of section 504); see text with note 139, *infra*.

134. Kohl v. Woodhaven Learning Center, 672 F. Supp. 1226 (W.D. Mo. 1987). *See* Kohl v. Woodhaven Learning Center, 676 F. Supp. 945 (W.D. Mo. 1987) (defendants not entitled to new trial).

substantial risk of spreading hepatitis B throughout the facilities. The court, however, concluded that since the plaintiff was "otherwise qualified," any risk of transmitting hepatitis B could be eliminated by inoculating the limited staff who would work with the plaintiff. According to the court, this accommodation would not impose an undue financial burden on the learning center.

Compensatory education was unavailable under section 504 in a California case. The Ninth Circuit Court of Appeals ruled that the eleventh amendment shielded the state from monetary liability.[135] Since the court found no distinction between a request for compensatory education and a request for monetary damages, California was held to be immune from liability.

In a higher education case, a student with retinitis pigmentosa (disease that causes loss of peripheral vision and loss of sight in reduced light) was not "otherwise qualified" for an optometry program because he could not fulfill the clinical proficiency requirements due to his handicap.[136] Waiver of the clinical requirement was found to be a substantial or fundamental, rather than reasonable, modification.[137] Section 504 does not require accommodations in programs that could pose potential danger to the public.

Employees

The cases reported in this section interpreting the Rehabilitation Act involve public employees in general rather than merely school personnel. The issues litigated in 1987 include: What is an impairment under the Act? What constitutes an otherwise qualified handicapped person? What is reasonable accommodation?

Handicapped Persons. To invoke the protections of the Rehabilitation Act employees must first establish that they are "handicapped" within the meaning of the Act. As defined by Congress, a handicapped individual is any person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.[138] In reviewing claims, courts first determine if there is an impairment, and then assess whether it substantially limits a major life activity.

In 1987 the United States Supreme Court in *School Board of Nassau County, Florida v. Arline* held that a teacher suffering from the contagious disease of tuberculosis was a "handicapped individual" within the

135. Alexopulos v. San Francisco Unified School Dist., 817 F.2d 551 (9th Cir. 1987).
136. Doherty v. Southern College of Optometry, 659 F. Supp. 662 (W.D. Tenn. 1987).
137. *Id.* at 673.
138. 29 U.S.C. § 706(7)(B).

meaning of section 504 of the Rehabilitation Act.[139] Applying the Act's regulations, the Court found that Arline had a physical impairment (physiological condition affecting her respiratory system) and the impairment limited a major life activity (work). An earlier period of hospitalization further established a record of impairment as identified in the regulations. The school district argued that Arline was not terminated from employment because of diminished physical capabilities but because of the threat she posed to the health of others. The Court disagreed with the contention that the contagious effects of a disease can be distinguished from the physical effects of the disease. Justice Brennan, writing for the majority, asserted that since both the contagiousness and the physical impairment resulted from the same condition "[i]t would be unfair to allow an employer to seize upon the distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment."[140]

The *Arline* case was closely observed by legal experts regarding the direction it might provide in defining the rights of AIDS victims. Clearly, an individual would be handicapped if the disease resulted in diminished physical or mental capabilities. The Supreme Court, however, expressly declined to comment on whether a person who is simply a carrier of a contagious disease without having a physical impairment could be considered handicapped. As noted above, a Missouri federal district court relying on the *Arline* analysis reasoned that a student with hepatitis B was handicapped because he was "regarded as having an impairment."[141] The District of Columbia federal district court in reviewing a challenge to the testing of foreign service employees for AIDS held that persons infected with the Human Immunodeficiency Virus (HIV) are handicapped individuals.[142] They are clearly perceived as handicapped and, furthermore, a large number of the carriers are physically impaired.

In 1986 an individual who alleged that he was denied a job because of his transvestite lifestyle was found, on a motion to dismiss, to have stated a claim under the Rehabilitation Act.[143] The District of Columbia federal district court later, however, found that the rejection of employment was based not on the fact that the plaintiff was a transvestite but on the supervisor's perception that he was a homosexual, which is not a

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139. 107 S. Ct. 1123 (1987).

140. *Id.* at 1128.

141. Kohl v. Woodhaven Learning Center, 672 F. Supp. 1226 (W.D. Mo. 1987); see text with note 133, *supra*.

142. Local 1812, Am. Fed'n of Gov't Employees v. United States Dep't of State, 662 F. Supp. 50 (D.D.C. 1987).

143. Blackwell v. United States Dept. of Treasury, 656 F. Supp. 713 (D.D.C. 1986). *See* Blackwell v. United States Dep't of Treasury, 639 F. Supp. 289 (D.D.C. 1986); *See* The Yearbook of School Law 1987 at 140.

handicap. Recovery was barred because the supervisor was unaware of the handicap.

A Pennsylvania employer asserted that a discharged employee with transitory back pain was not a handicapped individual. The federal district court stated that impairments must be determined on an individual basis, not in the abstract.[144] Because the employee suffered substantial pain and it affected most aspects of her life (work, walking, standing, sitting, etc.), she was found to be a handicapped individual.

Reasonable Accommodation for Otherwise Qualified Individuals. To establish a cause of action under the Rehabilitation Act, handicapped persons must establish that they are "otherwise qualified" for the position sought and that they were excluded from the position solely by reason of their handicap. An "otherwise qualified" handicapped person is one who can perform the essential functions of a position with "reasonable accommodation."

While the Supreme Court found that the teacher in *Arline* was a handicapped individual, she was entitled to relief only if otherwise qualified.[145] The Court recognized that "a person who poses a significant risk of communicating an infectious disease to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk."[146] To assess whether an individual with a contagious disease is otherwise qualified for employment, the Court advanced guidelines proposed by the American Medical Association. These steps include:

> [findings of] facts, based on reasonable medical judgments given the state of medical knowledge, about (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties) and (d) the probabilities that disease will be transmitted and will cause varying degrees of harm.[147]

The Court further stated that courts generally should defer to the reasonable medical judgments of public health officials. The case was remanded to the district court to determine if Arline was otherwise qualified.

Legitimate physical requirements of a position must be considered in determining whether a person is otherwise qualified. A federal district court ruled that a criminal investigator who suffered from epilepsy

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144. Perez v. Philadelphia Housing Auth., 677 F. Supp. 357 (E.D. Pa. 1987).
145. School Bd. of Nassau County, Florida v. Arline, 107 S. Ct. 1123 (1987).
146. *Id.* at 1131 n.16.
147. *Id.*

could not meet the physical requirements of the position.[148] The job required the use of firearms, apprehension of suspects, and day and night surveillance. Under the circumstances, he could not safely perform the essential functions of the job. Similarly, a four feet, five inches tall postal service employment applicant (achondroplastic dwarfism) had limited reach and was not qualified for a distribution clerk position.[149] The employer was not required to accommodate the handicap because of safety and efficiency problems. An individual who required the use of bioptic lens to satisfy visual acuity standards was not otherwise qualified for a driver's license.[150] Any accommodation was deemed to render the potential driver unsafe to drive. In a case challenging mandatory testing of foreign service employees for AIDS, HIV-infected persons were found to be handicapped individuals but not to be otherwise qualified for foreign service duty because of the greater risk of infection and the lack of medical care at foreign posts to treat problems that might arise.[151]

A Pennsylvania federal district court ruled that an employer violated the Rehabilitation Act by failing to provide minimal, inexpensive accommodations for an employee who sustained back injuries but was otherwise qualified.[152] An individual whose bus driver's license was recalled after a heart attack established that he was otherwise qualified to be a driver after corrective surgery. A Pennsylvania commonwealth court remanded the case for a determination of whether accommodating the individual would impose a burden on the department of transportation or compromise essential safety.[153] An employer met its burden with evidence that it made reasonable accommodations for a discharged blind employee, such as readers, special equipment and office space, and a reduced workload. The federal district court emphasized that the employer is not required to provide an individual with every accommodation requested, only reasonable accommodations to enable the employee to perform the essential functions of the position.[154]

Reasonable accommodation has not generally included reassignment to other positions. A postal service employee argued that his handicap necessitated transfer to permanent light duty to accommo-

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148. Salmon Pineiro v. Lehman, 653 F. Supp. 483 (D.P.R. 1987).
149. Dexler v. Tisch, 660 F. Supp. 1418 (D. Conn. 1987).
150. Sharon v. Larson, 650 F. Supp. 1396 (E.D. Pa. 1986). *See* Knowles v. Postmaster Gen., 656 F. Supp. 593 (D. Conn. 1987) (individual who did not take an employment test was not otherwise qualified).
151. Local 1812, Am. Fed'n of Gov't Employees v. United States Dep't of State, 662 F. Supp. 50 (D.D.C. 1987).
152. Perez v. Philadelphia Housing Auth., 677 F. Supp. 357 (E.D. Pa. 1987).
153. *In re* Stober, 524 A.2d 535 (Pa. Commw. Ct. 1987).
154. Carter v. Bennett, 651 F. Supp. 1299 (D.D.C. 1987).

date his needs. The Fourth Circuit rejected the claim, stating that "[t]he case law is clear that, if a handicapped employee cannot do his job, he can be fired, and the employer is not required to assign him to alternative employment."[155] Moreover, in this case the court noted that the employer could not reassign the employee because of the rights of other employees under the collective bargaining agreement.

OTHER ISSUES

The Eighth Circuit confronted the question of whether the Rehabilitation Act prohibits discrimination in the handling of an employee salary continuation program and health and dental benefits when a handicapped individual is no longer able to work.[156] Section 504 applies only to "otherwise qualified handicapped individuals." According to the Supreme Court, such an individual is "one who is able to meet all of a program's requirements in spite of his handicap."[157] Relying on this interpretation, the appellate court concluded that section 504 prohibits discrimination only within an employment relationship in which a handicapped employee is able to do his job.

A regulation requiring blood and urine tests of railway employees after certain accidents or fatal incidents was not found to violate the Rehabilitation Act.[158] The plaintiffs maintained that the dismissal of handicapped workers who could perform their jobs despite drug or alcohol use constituted discrimination. In rejecting the discrimination claim, the Ninth Circuit noted that the regulation did not prescribe dismissal and only alcoholics and drug abusers whose problems are under control are protected by the Act.

For section 504 restrictions to apply to an employer, the program or activity must receive federal financial assistance. The Seventh Circuit examined an institution's liability when funds are nonearmarked.[159] In this case, a city had received general revenue-sharing funds but had not allocated any funds to the fire department. Under these circumstances, the court held that the department was not subject to the anti-discrimination provisions of the Rehabilitation Act. The court did caution that this determination was in the context of an employer's use of revenue-sharing funds: "When the federal government furnishes [nonearmarked]

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155. Carter v. Tisch, 822 F.2d 465 (4th Cir. 1987). *See* Davis v. United States Postal Serv., 675 F. Supp. 225 (M.D. Pa. 1987) (reassignment not required but cannot deny opportunities reasonably available under existing employment policies).

156. Beauford v. Father Flanagan's Boys' Home, 831 F.2d 768 (8th Cir. 1987).

157. *Id.* at 771, *quoting* Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979).

158. Railway Labor Executives' Assoc. v. Burnley, 839 F.2d 575 (9th Cir. 1988).

159. Foss v. City of Chicago, 817 F.2d 34 (7th Cir. 1987).

aid to an institution, section 504 may require that the entire institution be treated as the 'program,' thereby rendering all of its programs and activities subject to section 504 regardless of how the institution actually allocates the funds."[160] The Rehabilitation Act was not found to be applicable to a hospital holding company, even though individual hospitals within the group received federal aid in the form of Medicare and Medicaid.[161] The Kansas federal district court concluded that to be a recipient an employer must receive direct financial assistance.

160. *Id.* at 37.

161. Eivins v. Adventist Health System/Eastern & Middle Am., 651 F. Supp. 340 (D. Kan. 1987).